

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*LI v MINISTER FOR IMMIGRATION & ANOR*

*[2011] FMCA 12*

MIGRATION – Review of decision of the Migration Review Tribunal – application to the Tribunal was made out of time – application to the Court did not contain a lawyer’s certification – application for judicial review was made out of time – whether it is in the interests of the administration of justice to extend time – application dismissed as not competent.

*Federal Magistrates Act 1999* (Cth), s.57

*Judiciary Act 1903* (Cth), s.39B

*Migration Act 1958* (Cth), ss.57, 66, 338, 347, 474, 476, 476A, 477, 486I, 494B, 494C, Pt.5

*Migration Regulations 1994* (Cth), reg.4.10, reg.461.212, Sch.2

*Federal Magistrates Court Rules 2001* (Cth), r.44.12

*Kaur v Minister for Immigration & Anor* [2010] FMCA 634

*SZMFJ v Minister for Immigration & Anor* [2009] FMCA 771

*MZXOT v Minister for Immigration and Citizenship* [2008] HCA 28; 233 CLR 601

*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16

*Chan Ta Srey v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) FCA 1292

*Minister for Immigration & Citizenship v Abdul Manaf* [2009] FCA 963

*Manaf & Anor v Minister for Immigration & Anor* [2009] FMCA 139

Applicant: HUIYANG LI

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG 1288 of 2010

Judgment of: Nicholls FM

Hearing date: 28 September 2010

Date of Last Submission: 5 October 2010

Delivered at: Sydney

Delivered on: 17 January 2011

## **REPRESENTATION**

Counsel for the Applicant: Mr A Kumar

Solicitors for the Applicant: Lawside Lawyers

Appearing for the Respondents: Mr A Markus

Solicitors for the Respondents: Australian Government Solicitor

## **ORDERS**

- (1) The application made on 28 September 2010 is dismissed as not competent pursuant to s.477 of the *Migration Act 1958* (Cth).
- (2) The applicant pay the first respondent's costs set in the amount of \$7,500.
- (3)

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA  
AT SYDNEY**

**SYG 1288 of 2010**

**HUIYANG LI**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**MIGRATION REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

1. On 10 June 2010 Mr Li, with the assistance of lawyers (Lawside Lawyers) presented to the Court's Registry what was said to be an application made under the *Federal Magistrates Act 1999* (Cth), s.39B of the *Judiciary Act 1903* (Cth), and s.476 of the *Migration Act 1958* (Cth) ("the Act").
2. The decision said to be the subject of the attempt to seek judicial review was the decision of the Migration Review Tribunal ("the Tribunal") made on 21 May 2010 concerning the applicant. A copy of that decision is annexed to the applicant's affidavit of 9 June 2010, which was presented at the same time as the document purporting to commence proceedings in this Court.

3. The Tribunal found that it did not have jurisdiction to review a decision made by a delegate of the respondent Minister on 18 January 2010.

## **Background**

4. The following chronology gives background to this matter. It is derived from the bundles of relevant documents put before the Court by the Minister. (See “Relevant Documents” – “CB”, and Supplementary Relevant Documents – “SCB”).)

## **The Application for the Visa**

5. Mr Li is a citizen of the People’s Republic of China. On 27 February 2009, he applied for a New Zealand Citizen (Family Relationship) (Temporary) visa. He was sponsored for this visa by a New Zealand citizen, who was a NZ Special Category Visa Holder in Australia. The basis of the sponsorship was said to be a marital relationship (CB 1 to CB 92 with annexures).
6. The application was refused on 18 June 2010 (CB 98 to CB 102). The applicant appears to have been notified by letter dated the same day (CB 96 to CB 97). The letter appears to have been sent by registered post (CB 98) to the address for receiving correspondence provided by the applicant in his application (Rosehill, NSW – CB 96 and CB 2).
7. The letter was returned to the Minister’s department by Australia Post as being “unclaimed” (CB 103).
8. On 22 February 2010 the Minister’s delegate sent an email to Mr Li in the following terms (see SCB and the reference to the re-notification letter below):

*“Dear Mr Li*

*The letter I have sent you has been returned to the department on the 22/02/2010. Please advise if you are no longer living at:*

*13/1-9 ELEANOR ST*

*ROSEHILL NSW 2142*

*AUSTRALIA*

*I have attached a copy of the letters sent to you regarding the refusal.*

*Kind regards*

...”

## **The Tribunal**

9. Mr Li applied for review to the Tribunal on 10 March 2010 (CB 117 to CB 123).
10. By letter dated 27 April 2010 the Tribunal wrote to Mr Li and invited his comments on the view that the Tribunal took that his application for review was not valid because it was not made within 21 days from the date on which Mr Li was taken to have been notified of the delegate’s decision (CB 139).
11. Mr Li responded by letter dated 3 May 2010, which was received by the Tribunal on 10 May 2010 (CB 140 to CB 195 with annexures).
12. The Tribunal found that:
  - 1) The applicable prescribed period for the making of the application for review of a Tribunal reviewable decision (per s.338(2)) was 21 days from the date when Mr Li was validly notified of the delegate’s decision (s.347(1)(b)(i) of the Act and reg.4.10(1)(a) of the *Migration Regulations 1994* (Cth) (“the Regulations”).
  - 2) The delegate’s decision notice complied with the requirements of s.66(2) of the Act.
  - 3) The decision notice was despatched within three workings days of its date to the applicant’s current address for service in accordance with s.66(1) and s.494B(4). Mr Li was therefore taken to have received the notice on 28 January 2010, being seven working days after the notice.
  - 4) The Tribunal considered the applicant’s submissions but found that they did not provide any basis for accepting the review application lodged on 10 March 2010.

- 5) The Tribunal noted that the period during which an application for review could be accepted in the circumstances was up to 18 February 2010.
- 6) The Tribunal had no discretion to accept an application made out of time and there was no provision for an extension of time.
- 7) As the application was lodged out of time the Tribunal had no jurisdiction in this matter.

### **Before the Court**

13. At the first Court date in this matter, on 7 July 2010, the applicant was represented by a solicitor. The Minister was represented by a solicitor employed by the Australian Government Solicitor.
14. Amongst other matters I noted that the purported application to the Court, which had been prepared and presented by lawyers, lacked the necessary lawyer's certification required by s.486I of the Act. The matter was adjourned to allow this and other matters to be addressed, including what was said to be a change in solicitors.
15. On resumption some weeks later no amended application or certification had been made. Nevertheless, the parties sought a final hearing date in anticipation of this and a number of other matters being addressed. This included the matter of what was described at the time as the "re-notification letter" of February 2010. The Minister's representative stated there was no record of such a letter on the relevant department file.
16. When the matter ultimately came on for hearing Mr A Kumar of counsel appeared for Mr Li. Mr A Markus appeared for the respondent.
17. An "amended" application had been presented to the Registry of the Court on 11 August 2010. It also did not contain a lawyer's certification even though it purported to have been: "Filed for the applicant by Lawside Lawyers".
18. The issue here is that s.486I of the Act, relevant to matters of migration litigation, requires a certification from any lawyer involved in the

making of such an application that the litigation has reasonable prospects of success.

19. Section 486I provides that the Court must refuse to accept a document commencing migration litigation if it is required to be certified, but has not been so certified.
20. In these circumstances it could not be that a Registrar of the Court would have acted contrary to an express statutory prohibition. This document therefore was not accepted for filing in the Court on 10 June 2010, even though it had been presented to the Court. There is no evidence before the Court to suggest this is not the case.
21. As to the “amended” application, I granted a short adjournment. The issue of the certification and other matters were attended to and the hearing proceeded on the basis of that “amended” application.

### **The Competency of the “Applications”**

22. The Tribunal’s decision was made on 25 May 2010. For the reasons set out immediately above, no appropriate application was made to the Court until 28 September 2010 (the date of hearing).
23. Section 477(1) of the Act provides that for an application pursuant to s.476 of the Act to be competent before the Court it must be made within 35 days of the date of the Tribunal’s decision. In the current circumstances this was not the case.
24. I did consider whether the relevant date in the current case could be said to be 10 June 2010, the date on which the applicant’s solicitor presented the “first application” to the Court’s Registry. Further, whether that date should be 11 August 2010, the date of the presentation of the “amended application”.
25. In this regard s.57 of the *Federal Magistrates Act* provides that proceedings in this Court are not invalidated by a formal defect or irregularity. (See further below at [44] and following.)
26. I am of the view however that the omission of the lawyer’s certification in the “application” (amongst other matters) cannot be said to be a formal defect or irregularity. It is a clear requirement of statute. The

language of s.486I is clear. Such a document cannot be accepted by the Court.

27. Further, what also remains unexplained is that even after the first Court date, and having been put on notice of this matter, and including a subsequent Court appearance, no action was taken, despite opportunity, to address this matter until after the commencement of the final hearing (28 September 2010).
28. Turning then to the application that was ultimately accepted before the Court. By 28 September 2010, it was well and truly outside the 35 day period set out in s.477(1). The “amended application”, first presented on 11 August 2010, now contained the lawyer’s certification and could otherwise be treated as being acceptable for the purposes of s.486I. However, it suffered from another omission. It did not contain an application in writing for the purposes of s.477(2)(a). Section 477(2) is in the following terms (see further below):

*“The Federal Magistrates Court may, by order, extend that 35 day period as the Federal Magistrates Court considers appropriate if:*

*(a) an application for that order has been made in writing to the Federal Magistrates Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and*

*(b) the Federal Magistrates Court is satisfied that it is necessary in the interests of the administration of justice to make the order.”*

29. On the issue of the Court’s jurisdiction the Minister’s position was, irrespective of whether the matter proceeded on the basis of consideration of an extension of time under s.477(2), or even if what was described as a “procedural irregularity” could be cured and the “application” of 10 June 2010 be taken to have been properly made and therefore within the time set out in s.477(1), that the application in all its iterations be dismissed because all of the grounds ultimately pressed lacked merit.



30. Both parties supported the position that the “application” of 10 June 2010 should be accepted, at least on the respondent’s side on the basis that it was a “misguided” attempt to make an application at that time.
31. Mr Markus submitted that, in these general circumstances, three options are available and have been separately pursued by this Court:
- 1) Not to grant the extension sought pursuant to s.477(2).
  - 2) Grant the extension of time pursuant to s.477(2), but then dismiss (for reasons normally to do with the merits) the substantive application.
  - 3) Grant the extension of time and (for reason) find for the applicant.
32. Mr Kumar sought leave, which was granted, to provide to the Court after the hearing authority which he said supported the applicant’s position in this regard. He subsequently referred the Court to *Kaur v Minister for Immigration & Anor* [2010] FMCA 634 (“*Kaur*”), a matter where this Court recently granted leave for an extension of time pursuant to s.477(2), but then dismissed the substantive application.
33. Two separate issues emerge in the circumstances of this case.
34. First, the approach used in *Kaur*, which equates to point 2 at [31] above, is in my respectful view based on an approach that the determination of what is in the interests of the administration of justice for the purposes of s.477(2) does not include any assessment of the merits of the substantive application (see [76] to [77] of *Kaur*). Such consideration is said to be conducted after the order to extend time has been justified (see [78] at *Kaur*).
35. I take a different view, as for example I adopted in *SZMFJ v Minister for Immigration & Anor* [2009] FMCA 771. That is, that all the relevant elements arising from the circumstances of a particular case (the extent of the delay, the reasons for it, any prejudice to the respondent, the impact on the applicant if time is not extended, the interests of the public at large, any exercise of the Court’s discretion, and the merits of the substantive application (not an exhaustive list)) are all factors relevant to the question as to whether it is in the interests of the administration of justice to make an order extending time.

36. In my view, it cannot be said to be in the interests of the administration of justice to extend time where an application to the Court, made out of time, lacks any merit in the grounds of the application themselves.
37. It was alluded to at the hearing that such an approach may lead to an applicant being denied the opportunity of competently making an appeal to the Federal Court if they were ultimately unsuccessful (see s.476A(3)(a) of the Act). Granting the extension of time would “overcome” this hurdle for the applicant.
38. Whatever views may be held about relevant legal policy in this regard, I do not see this as an acceptable argument to govern the approach of this Court to the disposition of matters that fall within the ambit of consideration of s.477(2).
39. Mr Markus also fairly submitted (and was unsurprisingly subsequently supported by Mr Kumar) that the approach to be taken by the Court is to have regard to the merits of the application. If the grounds do not rise above an arguable case then time to extend should be refused. If there is an arguable case then time should be extended, and either the application dismissed if it does not “get over the line”, or the relief granted if it does.
40. The difficulty that I have with this is that the statutory test for extending time is not one of an arguable case, as for example is applicable at a show cause hearing pursuant to r.44.12 of the *Federal Magistrates Court Rules 2001* (Cth) (“Rules”). It is whether the Court considers that it is in the interests of the administration of justice that the time should be extended.
41. I agree with Mr Markus that, from a legal policy perspective, there is a powerful argument that says that the merits of the substantive application in judicial review of an administrative decision should be considered by the Court. But matters of legal policy of this type are, initially at least, for the government and the Parliament. In this situation the Parliament has made its intention clear. I can only assume that in making the submissions that he did on this point, Mr Markus was acting under instructions from his client.

42. If the Minister, in his current incarnation, takes a different view from that of his predecessors as to how s.477 should operate, then it is for the Minister to persuade Parliament to his point of view and amend the legislation.
43. In any event, on the approach that I favour, the Court does have regard to the merits of the substantive application in consideration of the statutorily imposed test of what the Court considers to be in the interests of the administration of justice.
44. The second issue relates to s.57 of the *Federal Magistrates Act*.
45. It is the case that s.57(2) provides that the Court may in its discretion declare a proceeding to be “not invalid”:
- 1) by reason of a defect that is considered by the Court to be found;  
or
  - 2) by reason of an irregularity.
46. In my view a formal defect or an irregularity in matters such as that currently before the Court would encompass such matters as, for example, the wrong date of the Tribunal decision, a mistaken reference to a section of the Act, the failure to properly plead the grounds contended, or even some requirement of the Rules of this Court.
47. The difficulty that I have in seeing the absence of the lawyer’s certification as being a “formal defect” or “irregularity” is that this is a requirement of statute. The direction in s.486I(2) is plain: “A court must refuse to accept a document commencing migration litigation if it is a document that, under subsection (1), must be certified and it has not been.” Subsection 486I(1) is in the following terms:
- “A lawyer must not file a document commencing migration litigation, unless the lawyer certifies in writing that there are reasonable grounds for believing that the migration litigation has a reasonable prospect of success.”*
48. The document purporting to commence litigation on 10 June 2010 was presented for filing by lawyers (Lawside Lawyers). It did not contain any certification as required by statute. At that time, had it complied

with the relevant statutory requirement the application would have been within time.

49. By the time of the first Court date in this matter (7 July 2010) the “application” was out of time. Nonetheless this omission was made clear by the Court to the applicant’s solicitor who appeared on that day. However, on a second Court occasion (14 July 2010) this matter had still not been attended to.
50. Surprisingly, even when a purported “amended application” (which again contained the reference to the same firm of solicitors) was presented for filing on 11 August 2010, still no attempt was made to comply with s.486I of the Act.
51. Even at the hearing six weeks later the Court was required to provide a short adjournment so that this matter could be finally attended to.
52. No explanation was offered to the Court to explain any difficulty in this regard on the part of the applicant’s solicitor. In all therefore, given that the Court cannot accept for filing, in effect, an application from a lawyer without the statutorily required certification, then the application in this case was not made to the Court until 28 September 2010. There is no evidence before the Court that the applicant, as opposed to his lawyer, sought to file the application notwithstanding the lawyer’s involvement in his case.

### **The Competency of the Application Made on 28 September 2010**

53. The application for judicial review is out of time pursuant to s.477(1) of the Act. The issue becomes whether the Court should extend time pursuant to s.477(2).
54. Section 477(2)(a) requires an application for such an extension of time to be made in writing to the Court specifying why the applicant considers it necessary that an order be made to that effect in the interests of the administration of justice.
55. No such application was made even after the short adjournment was granted at the hearing to attend to the matter of the lawyer’s

certification. A yet further opportunity was provided to attend to this matter. The application for an extension of time was then sought.

56. Although it did not directly specify any reasons for the order, I took the view that when the application was read as a whole the applicant's reason for seeking the extension of time was because he asserted that the grounds of the application had merit. Section 477(2)(a) is therefore satisfied.
57. The question then becomes whether the Court can be satisfied that it is in the interests of the administration of justice that the time be extended pursuant to s.477(2)(b).
58. Although not an exhaustive list, I have referred to some of the elements to be considered at [35] above. In this I also have regard to the following evidence:
  - 1) The Court Book.
  - 2) The Supplementary Court Book. (Email from the Minister's department to the applicant dated 22 February 2010.)
  - 3) Paragraphs 13, 16, 21 of the applicant's affidavit of 10 August 2010, which were admitted provisionally subject to relevance.
  - 4) Applicant's Exhibit 1 ("AE1"): An email to the applicant from an officer in the Minister's department of 15 June 2010.
  - 5) The applicant's affidavit of 9 June 2010.
  - 6) (Not pressed, nor therefore read into evidence, was the affidavit of Bing Lin Tan of 10 August 2010.)
59. Turning specifically to the question of whether it is in the interests of the administration of justice to extend time pursuant to s.477(2) in relation to the application of 28 September 2010. Although I have taken the view that no application was properly made on 10 June 2010, it is nonetheless appropriate that, for the purposes of assessing the extent of the delay and the reasons for it, regard be had to the relevant events on that day. That is, that the applicant, through his solicitors, had every intention to make his application on that date and within time.

60. Why the “application” was deficient and why no action was taken to address the deficiencies despite opportunity remains unexplained.
61. Nonetheless in all the circumstances, and in particular because I do not consider it in the interests of the administration of justice that the applicant should be disadvantaged by any lack on the part of his legal representatives, I do not consider the delay on its own to be such as to cause me not to extend time.
62. Nor do the other elements referred to above (see [35] above), other than the merits of the substantive application, lead to the application for extension being refused. The Minister has not pressed any prejudice to him.
63. This then leaves the merits of the substantive application as the sole and central consideration on this question. In this regard, for the reasons that follow I find that the applicant’s grounds as fully pressed, with the benefit of counsel, do not reveal jurisdiction error on the part of the Tribunal, and in some instances are baseless or bound to fail.

## **Ground One**

64. Ground one of the substantive application is such an instance. It asserts a breach of the delegate’s obligation pursuant to s.57 of the Act to provide certain information to the applicant for comment.
65. The written submissions make reference to a number of errors of law, although it is not clear what also is complained of beyond what is said to be a breach of procedural fairness by the delegate. The submissions assert that the “powers” of this Court are invoked pursuant to s.476(1) of the Act in this regard. It is a pity that the author of these submissions (no signature or identity is provided) did not continue to also read the other parts of s.476.
66. This Court has no jurisdiction in relation to a “primary decision” (s.476(2)(a)). A “primary decision” is defined in s.476(4) as one that is relevantly reviewable under Pt.5 of the Act, or one that would have been reviewable had it been made in time to the Tribunal.

67. Section 338 relevantly sets out the decisions reviewable by the Tribunal. As the Tribunal correctly found, the delegate's decision is an MRT-reviewable decision pursuant to s.338(2). That the Tribunal found it did not have jurisdiction does not make the decision an MRT-reviewable decision (s.476(4)(b)).
68. Before the Court the applicant sought to rely on *MZXOT v Minister for Immigration and Citizenship* [2008] HCA 28; 233 CLR 601 ("*MZXOT*") for the proposition that the Court has the authority to review the delegate's decision in the circumstances of this case. I understood the argument to be that there are circumstances where a "primary" decision is reviewable despite the provisions of s.476(1).
69. No specific connection was made to *MZXOT* with the circumstances of this case. At best I understood the reference may have been to [11], [137] and [191] of *MZXOT*, where there is a discussion of jurisdiction.
70. The problem for the applicant is that while the Court in *MZXOT* may have been looking at s.476(1) and a primary decision, the circumstances of this case are that the delegate's decision was reviewable under Pt.5 of the Act, and as such this Court has no jurisdiction to consider any such complaint about the delegate's decision.
71. The applicant also relied on *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 ("*SZMDS*"), probably with reference to [7], [17] and [23] of the High Court's judgment.
72. The difficulty for the applicant is that in these parts of the judgment, and indeed generally, *SZMDS* was concerned with s.474 and not s.476 of the Act. That the delegate may have failed to provide procedural fairness to the applicant pursuant to s.57 of the Act in relation to certain information, or failed to properly consider any such information, or even if the common law principles of procedural fairness applied to this case before the delegate as contended in submissions, does not assist the applicant before this Court.
73. In short, the fact that the Tribunal found that it did not have jurisdiction to review the delegate's decision does not serve to convey jurisdiction on this Court to conduct judicial review of the delegate's decision. The

delegate's decision was reviewable by the Tribunal pursuant to Pt.5 of the Act. Had it been made within time to the Tribunal it would have been so reviewed. Subsections 476(2) and (4) make it clear no jurisdiction is conferred on this Court in these circumstances.

74. The applicant's reliance in submissions on *Chan Ta Srey v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) FCA 1292 ("*Chan Ta Srey*") was not explained.
75. While the delegate's decision may be amenable to a writ of mandamus, despite s.66(4) of the Act, *Chan Ta Srey* at [50] to [51] does not assist with the ground as pleaded, nor otherwise.
76. The writ of mandamus may lay in certain circumstances where there is a defect in the notification of a decision (a failure to put certain information required by s.66(2) in the letter of notification of the decision), but to achieve any such consideration by this Court would require this Court to have such jurisdiction in the first place. For the reason already advanced above, that is not the case.
77. To the extent that the applicant seeks to imply that the Tribunal fell into error because it did not review the delegate's decision, which was said itself to contain error, again fails to recognise that to embark on the conduct of the review the Tribunal also needed to have jurisdiction to do so. Simply because error is asserted in the delegate's decision, or even if such error were seen to clearly exist, does not of itself create jurisdiction for the Tribunal, as appears to be the consequential implication of the applicant's submissions.
78. To the extent that this is otherwise an argument as to why the Tribunal did have jurisdiction then this is subsumed in grounds three and four below.
79. The ground as pleaded asserts jurisdictional error on the part of the delegate and invites the Court to grant relief as against the delegate's decision. For the reasons set out above such a ground, as particularised, is hopeless and bound to fail. It has no merit such as to cause the Court to act to grant the extension of time.



## **Ground Two**

80. Ground two in the application is not pressed. In the circumstances its abandonment can only lead to the inference that the applicant's legal representatives have themselves subsequently come to recognise that the ground lacked merit.

## **Grounds Three and Four**

81. Ground three asserts error on the part of the Tribunal on the basis that, given that the applicant received a "second" notification of the delegate's decision (the "second letter" of 22 February 2010), the time for making the application for review was extended as of that date and the application for review made on 10 March 2010 was made to the Tribunal within time.
82. Ground four of the application asserts jurisdictional error on the part of the Tribunal on the basis that the Tribunal misconstrued the law in respect of the power conferred by s.494C(7)(b) of the Act, which in the circumstances allowed it to exercise its jurisdiction.
83. The applicant's written submissions address these grounds together. In essence, the complaint is that the Minister, through his delegate, sent two notification letters: the first dated 18 January 2010 (CB 95), the second dated 22 February 2010 (SCB). The submission is that the second notification was properly given and, because of s.494C(7) of the Act, the notification date became 22 February 2010. The application to the Tribunal was therefore made within time.
84. The applicant submitted that he did not receive the first letter, but is able to "prove" that he received the second letter, thus bringing it within the provision of s.494C(7).
85. Ground four claims to be an extension of ground three. At best, it appears the argument is that the date provided in the "second" letter, as the relevant date of decision, is 22 February 2010. The letter told the applicant he had 28 days from this date to apply for review. He relied on this communication and made his application in time.

86. The references to natural justice and procedural fairness in the circumstances are unclear, but it appears the applicant is saying that the “deeming rules” in the Regulations do not displace the rules of procedural fairness in the Act.
87. Before the Court Mr Kumar explained that those parts of the written submissions asserting that the “deeming” provisions in the Regulations do not displace the rules of procedural fairness and the Tribunal therefore should have reviewed the delegate’s decision, were no longer pressed.
88. In all the circumstances, I can only agree with the Minister that the applicant’s grounds as initially presented and ultimately pressed are misconceived both in fact and in law.
89. First, there is some deficiency in the state of the applicant’s relevant evidence before the Court. The applicant’s affidavit has annexed a copy of what was said to be the “second” letter of notification. No original has been presented to the Court. Further, “AE1” (see [58] above) is said to be an email from the Minister’s department to the applicant.
90. But even proceeding on the basis that a “second letter” was sent, I am satisfied in the circumstances that the “second letter” was sent by the delegate not in an attempt to re-notify the decision, but to provide the applicant with a copy in circumstances where the applicant had not actually received the first letter. This is clear when regard is had to the copy of the email sent by the delegate to the applicant on 22 February 2010 (see [8] above). Given the timing and the clear language employed, the delegate apparently was moved to send a copy of the “first letter” when it was returned as unclaimed. The delegate has plainly not sought to re-notify. The plain words used in the email make it clear that a copy of the letter had been previously sent.
91. Why this “copy” bore the date “22 February 2010”, instead of “18 January 2010”, remains unexplained by any evidence before the Court. (It may have to do with computer programs that do not permit the reproduction of a letter or document containing a date other than the date when that copy is sought. Or it may have been a simple oversight by the delegate.) In any event, as set out below, this does not assist the applicant.

92. In the meantime, I note that the applicant could have subsequently been under no doubt as to the situation relevant to his review rights. Nor that the delegate was purporting to re-notify him of the decision. On 25 February 2010 he sent an email to the delegate (CB 115):

*“I am sorry to be advised that the letter you mailed to me had been returned to you. In fact, I have been living at the same address (Unit 13, 1-9 Eleanor Street, Rosehill NSW 2142) since May 2009. I had been waiting for your refusal letter since last month, however, I never received any notice from Australia Post in relation to your letter.”*

[Errors in original.]

93. The delegate responded by email on 1 March 2010 (CB 115):

*“Dear Mr. Li,*

*The Australian Post advises that their notice to pick up the documents (left at your address) had been unclaimed for a few weeks. Your options as advised in the letter still stand except if the MRT do not accept your application to review then it is out of the department’s hands. I will not be able to extend your review rights as your refusal letter was not sent in error. Please advise if you would like to pick up your original documents if you would like to relodge offshore.*

*Kind Regards,”*

94. See also the delegate’s email of 22 February 2010 (SCB):

*“I have attached a copy of the letters ‘[the letter of notification – CB 104, and the letter of decision record – CB 106]’ sent to you regarding the refusal.”*

95. There is nothing here to suggest any re-notification.

96. But as Mr Markus submits, even if it could be so construed this would not assist the applicant. I note what Sundberg J relevantly said in *Minister for Immigration & Citizenship v Abdul Manaf* [2009] FCA 963 (“*Abdul Manaf*”), a case which involved a “third letter” in circumstances involving notification of a delegate’s decision where the first letter was found to be a valid notification, a second letter was found to amount to a re-notification, and in fact a third letter was sent (see at [6] to [8]).

97. At [26] his Honour said:

*“In my view the Minister has a strong case that once the Federal Magistrate had rejected the technical attacks on the validity of the first notification letter, he should have concluded that the respondent had been notified of the delegate’s decision on the ground that the defect in the second notification letter cannot affect the validity of a notification that had already been ‘taken’ or ‘deemed’ to have occurred prior to the second notification letter being sent.”*

98. Further at [28]:

*“The contention that the respondent’s application for review will determine her right to a visa is in my view much weaker than the Minister’s strong case described at [26]. On that case, the third notification letter was incapable of having any effect because the first notification letter was effective. Accordingly the Tribunal would have no jurisdiction to entertain the application. Section 347(1) requires an application for review to be made in the approved form and be given to the Tribunal within the prescribed period. The prescribed period in reg 4(10)(1)(a) is 21 days after the notification of the decision. Notification took place on 16 August 2007. The current application was not made within the prescribed period, and accordingly is not competent. The Tribunal has no jurisdiction to entertain it. The Department’s letter of 24 March 2009 cannot confer on the Tribunal jurisdiction it does not have. The respondent’s discretionary consideration depends on the Minister’s contention, just described, being erroneous. All I need say at this stage is that in view of the strength of the Minister’s case, I do not regard this discretionary consideration, which is at odds with that strong case, to be sufficiently persuasive to cause me to refuse an extension of time.”*

99. The applicant now does not assert that the letter of 18 January 2010 was not correctly issued.

100. I note in this regard that in written submissions (at [31]) some ambiguous reference is made to the use of the order of the applicant’s name: “Hui Yang Li” and “Li Huiyang”.

101. Whatever the submissions seek to say, the applicant completed the application for the visa by providing the following (CB 3):

*“Your full name*

*Family name: LI*

*Given names: HUIYANG”*

102. The delegate’s letter was addressed to “Mr Huiynag Li” and sent to the address for service. Whatever the submissions may seek to argue now, even some cultural inversion in the order of names, the delegate addressed the letter consistently with what the applicant had provided in his application. That the applicant was asked to give his surname first in the application form does not reveal error in the way the delegate subsequently addressed the relevant correspondence.
103. No other error in the “first” letter of notification is asserted. None is apparent on the material before the Court.
104. *Abdul Manaf* was a case on appeal from a Federal Magistrate (*Manaf & Anor v Minister for Immigration & Anor* [2009] FMCA 139). It is therefore binding on me. Absent some error or failure to comply with the relevant statutory requirements, the letter of 18 January 2010 is a valid and effective notification of the decision. The second letter has no effect in these circumstances.
105. In the circumstances, the prescribed time for the making of the application for review was 21 days after the date when Mr Li was taken to have been notified of the decision.
106. There is no error in the Tribunal’s analysis in this regard. Section 494C(7) does not assist Mr Li in these circumstances.
107. It is a pity that Mr Li’s legal representatives appear not to have done the necessary legal research. It appears this very argument, relying on s.494C(7), was also raised in *Abdul Manaf*. This did not assist the “applicant” in that case. (See [31] to [35] for the same reason as given by his Honour at [28] of that judgment.) Yet no attempt was made to distinguish the circumstances in this case from those in *Abdul Manaf*. Nor was any submission made that *Abdul Manaf* was (with respect) wrongly decided.
108. Whatever Mr Li’s legal representatives seek to achieve with reference to procedural fairness and “no jurisdiction” in the current case, they miss the point that the Tribunal had not embarked on the conduct of the

review such as to engage any procedural fairness principles in the conduct of that review.

109. Further, in relation to the question of its lack of jurisdiction, the Tribunal wrote to the applicant on 27 April 2010 and put him on notice of its preliminary view in this regard. It invited his submissions (CB 139 and [5] at CB 200).
110. The applicant responded by letter dated 7 May 2010 (CB 140 to CB 195 with annexures). Unfortunately for the applicant, this was directed to the merits of his application for the visa, rather than the question of the Tribunal's jurisdiction.
111. In the current case, the Tribunal was correct to find that the letter of 18 January 2010 was an effective notification of the delegate's decision. In these circumstances, given that the relevant time had passed, the Tribunal had no discretion to extend the time simply on the basis that the applicant now says he was also notified on 22 February 2010.
112. Ultimately the applicant's complaints now are disposed of by what Sundberg J said in *Abdul Manaf*. A further "notification letter" has no relevant effect so long as the "first letter" complied with all the relevant and statutory requirements. In the current case it did.
113. Critically, a further letter (even if what occurred could be construed as such) cannot act to confer jurisdiction on the Tribunal that it does not have (*Abdul Manaf* at [28]).
114. Grounds three and four, either as stated in the application or explained in submission, lack merit to reveal error on the part of the Tribunal.

## **Ground Five**

115. Ground five asserts some reliance on the concept of estoppel. This was said in submissions not to be now pressed.
116. As such, an inference can now be drawn that the applicant concedes the ground as pleaded (the reliance on estoppel) does not reveal error on the part of the Tribunal.

117. However, in submissions, a new complaint was raised. The assertion now is that the “minimum requirements” of s.66(2)(c) of the Act were not met. This subsection provides that the delegate must give reasons for the finding that a criterion relevant to the grant of the visa applied for was not met.
118. This is said to be that the delegate had disregarded a critical component of the evidence. With reference to the delegate’s reasons, this would appear to be a reference to how the delegate dealt with information from the Australian Consulate in Shanghai (CB 99.3 and CB 100.9). That is, that Mr Li had come to Australia with the intention of entering into a contrived marriage for the purpose of obtaining a visa to remain permanently in Australia.
119. In short, it was said the delegate’s failure to give proper reasons in relation to this letter was a breach of s.66, despite the provisions of s.66(4).
120. This complaint is baseless and misconceived. In essence, it seeks to challenge the way the delegate dealt with information before her. It does not go to the issue of notification pursuant to s.66.
121. Section 66(1) provides that the Minister is to notify an applicant, in the prescribed way, of the decision, relevantly in this case, to refuse the application for the visa. On what is before the Court, the delegate’s letter of 18 January 2010, and the circumstances of its sending, complied with this requirement.
122. Section 66(2)(c) requires the delegate to give written reasons as to why, relevant to this case, the criterion for the visa was not satisfied. In the current case, noting the application made was for a Subclass 461 visa (see Sch.2 to the Regulations), the relevant criteria were set out at reg.461.212.
123. Any plain reading of the delegate’s decision record reveals that she was not satisfied that Mr Li was in a genuine and continuing relationship with the woman who had provided the sponsorship for his application (see CB 102.3).
124. What is set out in the decision record, and in particular that part reproduced at CB 100, makes the reasons for this clear. As Mr Markus

submits, whether the delegate's conclusion was correct or not does not of itself reveal a failure to notify of the decision and the reason why the relevant criterion was not met.

125. In all, this can only be seen in the circumstances as another attempt to seek review of the delegate's decision, albeit presenting it as a failure to properly notify. In the circumstances this ground also not only lacks merit, but is bound to fail. It is not made out.

## **Conclusion**

126. With the benefit of legal advice and assistance, the applicant has attempted to put, and pressed, a number of grounds and arguments even beyond the grounds as pleaded. None of them reveal error in the Tribunal's conclusion that it lacked jurisdiction. However, not only are none of the grounds and arguments not made out but, for the reasons set out above, they lack merit.
127. I cannot see that it is in the interests of the administration of justice to extend time to allow the application of 28 September 2010 to proceed further. The grounds asserted, even as explained, do not lend themselves in any meritorious way to further consideration. For the purpose of s.477(2) they do not justify the granting of the application to extend time.
128. In these circumstances the application of 28 September 2010 is dismissed as not competent.
129. For the sake of completeness I note again that the documents presented for filing on 10 June 2010 and 11 August 2010 could not be accepted for filing by the Registrar, nor the Court. Nothing further is required in relation to these other than to emphasise that, even if an extension of time pursuant to s.477(2) were to have been granted in relation to either document without reference to the grounds as stated in these documents and as subsequently pressed and explained, for the reasons set out above, even if these were taken to be applications they would have been dismissed.



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**I certify that the preceding one hundred and twenty-nine (129) paragraphs  
are a true copy of the reasons for judgment of Nicholls FM**

Associate:

Date: 17 January 2011